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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1133

TERREBONNE PARISH SCHOOL BOARD, FOR THE USE AND BENEFIT OF THE PUBLIC SCHOOLS OF TERREBONNE PARISH, ROBERT D. STERLING, RUTH L. STERLING AND ROBERT W. O'MEARA,

Petitioners,

versus

TEXACO INC.,

Respondent,

STATE OF LOUISIANA AND STATE MINERAL BOARD,

Intervenors-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

PAUL F. SCHLICHER,
135 East 42nd Street,
New York, New York,
Attorney for Respondent,
Texaco Inc.

WILEY G. LASTRAPES,
DANIEL P. HURLEY,
New Orleans, Louisiana,
JOHN M. DUHE, JR.,
New Iberia, Louisiana,
CHARLES F. BAILEY,
Lafayette, Louisiana,
Of Counsel.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

STATEMENT OF THE CASE.

This case presents for decision the basic question whether navigable water bodies (being portions of Mud Hole Bay and Mud Hole Bayou) located within the protracted outlines of unsurveyed Section 16, T-21-S, R-14-E, Terrebonne Parish, Louisiana, belong to the State of Louisiana in a proprietary capacity

by virtue of its inherent sovereignty or belong to the State in trust for public schools.

This issue was raised in a proceeding filed by Petitioners to have a mineral lease granted by the Terrebonne Parish School Board recognized as covering such navigable bodies of water and to seek partial cancellation of a prior mineral lease granted by the State of Louisiana and now held by Respondent, Texaco Inc. The School Board lease describes and purports to cover "Section 16, T-21-S, R-14-E, Terrebonne Parish, Louisiana", the school section in question. The State lease covers "all State owned lands, water bottoms, etc. located within a described circle which embraces, with other property, the entire area within the protracted outlines of said section.

The petition herein (p. 22) concedes that said 16th Section was never surveyed. The record shows that the southeast corner thereof was the only corner established by the governmental surveyors (as a corner common to Sections 15, 21 and 22), and that all exterior section lines were simply protracted or projected from said established corner.[1] Within the unsurveyed outlines of said section are land areas, and also navigable water bodies consisting of portions of Mud Hole Bay and Mud Hole Bayou, and in their petition in the trial court, plaintiffs claimed that both the land and water areas are public lands comprising a 16th School Section.

However, the land areas were eliminated from the suit by the pleadings (R., Vol. 1, 22, 33), and by an

[1] Petitioners' Exhibits 36 and 37. *United States vs. State of Wyoming*, (1947) 331 U.S. 440, 67 S. Ct. 1319 conclusively establishes that this does not constitute the survey of a section.

express disclaimer executed by Defendant, Texaco Inc., the owner of the State lease (Def. Exhibit 3; R., Vol. 2, 7), leaving only Mud Hole Bay and Mud Hole Bayou as the areas in dispute.

The basic opposing contentions of the litigants are clear cut: Petitioners contend that title to the water bodies in controversy within the outlines of said 16th Section vested in the State of Louisiana, in its capacity as Trustee for public schools, under the Acts of Congress of April 21, 1806 (2 Stat. 391) and March 3, 1811 (2 Stat. 662) reserving the 16th Section of each township, as might thereafter be created by survey, for the benefit of the schools of such township. Opposing this, Respondent maintains that when Louisiana was admitted to Statehood in 1812, all inland water bodies which were then navigable, including Mud Hole Bay and Mud Hole Bayou, vested in the State by virtue of its inherent sovereignty, free and clear of the school land reservations made in the Acts of 1806 and 1811.

Petitioners concede that the school title does not vest in 16th Sections reserved under the Acts of 1806 and 1811 until there has been an actual survey of the section and an official approval thereof.[2] However, they claim that such title to the unsurveyed 16th Section here involved vested retroactively to

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[2] Petition, pp. 19, 20. The necessity for a survey and its approval as the basis for passage of title to a school section is firmly established by decisions of this Court: ***Heydenfeldt vs. Daney Gold & Silver Mining Company***, 93 U.S. 634, 23 L. Ed. 995; ***Minnesota vs. Hitchcock***, 185 U.S. 373, 46 L. Ed. 954; ***United States vs. Morrison***, 240 U.S. 190, 60 L. Ed. 599; ***United States vs. Sweet***, 245 U.S. 563, 38 S. Ct. 193; ***Wisconsin vs. Lane***, 245 U.S. 427, 38 S. Ct. 135; ***United States vs. Wyoming***, 331 U.S. 440, 67 S. Ct. 1319.

December 8, 1842, the date of approval of the partial survey of the township (Petitioners' Exhibit 36), by virtue of the Protraction Act of April 23, 1912 (37 Stat. 90). That act is limited to townships where the State of Louisiana acquired swamp lands by certification or patent under the Swamp Land Act of 1849 (9 Stat. 352) or under the Swamp Land Act of 1850 (9 Stat. 519).[3] Under its provisions unsurveyed public lands which are found to be embraced in 16th Sections formed by official protraction of existing governmental surveys are confirmed as school lands *in the same manner as though the official surveys had been regularly extended over those townships.*

The trial court rendered judgment for plaintiffs without deciding the title question, holding simply that even if these water bodies were owned by the State in its proprietary capacity, the State Agency Leasing Act (L.S.A. 30:151 et seq.) authorized the School Board to lease the property as an agency of the State.[4] The Louisiana Court of Appeal, First Circuit, reversed, holding that the State acquired the water bodies in question in its sovereign capacity upon admission into the Union in 1812, and could not be divested of title 100 years later by passage of the Protraction Act. The basis for that holding was the

[3] A survey was not required for passage of title under the Swamp Land Grants, "a personal examination" of the land being sufficient. *State of Louisiana vs. Bayou Johnson Oyster Company*, 130 La. 604, 58 So. 405; *McDade vs. Bossier Levee Board*, 109 La. 625, 33 So. 628. The evident purpose of the Protraction Act was to eliminate the burden and costs of surveying 16th Sections in "swamp townships" not requiring survey as to the balance of the land and where land values were too low to justify this expense.

[4] This holding does not involve a federal question, but only the construction of a State Statute, and the petition (p. 8) so concedes.

factual finding that Mud Hole Bay and Mud Hole Bayou are navigable bodies of water and were so prior to and at the time Louisiana became a State. Accordingly, the exclusive right of the State to lease the water bottoms under the State Leasing Act (L.S.A. 30:121 et seq.) was upheld. The Appeal Court decision became final when the Louisiana Supreme Court denied Plaintiffs' application for a writ of review.

SUMMARY OF ARGUMENT.

1. Mud Hole Bay and Mud Hole Bayou are not part of the 16th Section here involved. They are expressly excluded from said section by the provisions of the Acts of April 21, 1806 and March 3, 1811, and are also impliedly excluded since said acts relate only to the public lands of the Orleans Territory. "Public lands" do not include the soil beneath navigable water bodies. The School Land Indemnity Acts remove any doubt concerning this interpretation by providing for "in lieu" lands to compensate for deficiencies in school sections resulting from natural causes, such as intrusive navigable water bodies.

2. Under the "equal footing clause" of the Constitution, each new State acquired, by virtue of its inherent sovereignty, the soil beneath its inland navigable waters upon its admission into the Union, except such as may have been disposed of during the territorial period by special laws which were impelled by international duty or public exigency, and even then a presumption against disposal obtained. Under these principles there was no disposi-

tion of the navigable water bodies of the Orleans Territory by the Acts of 1806 and 1811. *These acts are not special laws relating to particular water bodies, but general laws relating to all public lands in the Orleans Territory.* They not only fail to overcome the presumption against disposal, but clearly show an intention not to dispose.

3. Assuming that Congress intended by the Acts of 1806 and 1811 to include navigable water bodies in the 16th Sections reserved for schools, such reservations are not *in praesenti* and are subject to withdrawal or other disposition until the school title actually vests. In the present case the school title could not attach until the Protraction Act of 1912 since the property was never surveyed. In the meantime the water bodies were automatically "disposed of" when title thereto passed to Louisiana in 1812 under the "equal footing clause" of the Constitution.

4. The State is not prevented from asserting its sovereignty ownership of Mud Hole Bay and Mud Hole Bayou because of the selection of the 16th Section here involved under the Swamp Land Grant of 1849, and the rejection thereof as land previously reserved for schools. As a matter of law, such selection and rejection covered only the swamp land within the outlines of the unsurveyed section, and did not include the navigable water bodies therein. Additionally, a 16th Section does not exist until surveyed, and the rejection thereof could only be of such property as would be a part of the section when surveyed. This would exclude the water bodies in dispute.

Finally, the Land Department's ruling could not, in any event, bind the State because its decisions are binding only with respect to matters falling within its jurisdiction. The Land Department had no jurisdiction with respect to the navigable water bodies here involved.

ARGUMENT.

Petitioners state that the federal question posed herein is whether the *entire 16th Section* is school land even though parts thereof are navigable waters. The real issue is whether the navigable water bodies in dispute are public lands reserved for school purposes, or whether they are sovereignty owned. Petitioners' statement is erroneous in that it assumes the water bodies to be a part of the section.

It is also stated in the petition that this action is one of first impression presenting a public question of vital importance. Quite to the contrary, this case rests on principles long established by decisions of this Court. These principles are decisive of this case. Petitioners were confronted with these decisions in the State Courts, and elected to ignore them. A reading of the petiton herein reflects that they continue to do so.

I.

MUD HOLE BAY AND MUD HOLE BAYOU FORM NO PART OF SECTION 16, T-21-S, R-14-E, AND HENCE THE PRESENT APPLICATION MUST BE DENIED BOTH ON JURISDICTIONAL GROUNDS AND ON THE MERITS.

Jurisdiction herein is predicated entirely on 28 U.S.C.A. 1257 (3), providing for the review of a State Court decision by writ of certiorari where any title or right is set up or claimed under the Constitution, Treaties or Statutes of the United States. Petitioners' case is based entirely on the Acts of April 21, 1806 and March 3, 1811, reserving for schools rectangular 16th Sections to be thereafter created by the governmental surveys. If Mud Hole Bay and Mud Hole Bayou were not part of the 16th Section here involved, their claim thereto cannot be based on nor asserted under these acts, and jurisdiction herein is entirely lacking.

The Act of May 18, 1796 (1 Stat. 464), relating to the territory northwest of the Ohio River and above the mouth of the Kentucky, established the rectangular system of surveying the public lands. It provides for townships 6 miles square, subdivided into 36 sections, each 1 mile square, but authorized departure therefrom where impracticable due to *"navigable rivers,"* prior surveys or grants, etc., and the creation of fractional townships and fractions of sections in those situations. The Acts of April 21, 1806 and March 3, 1811, adopted the same method of survey. It should be noted, however, that Section 2 of the

Act of 1811, applicable to the entire Orleans Territory out of which the State of Louisiana was erected (Act of February 20, 1811, 2 Stat. 641; Act of April 8, 1812, 2 Stat. 701), additionally provides that where lands are adjacent to water courses the surveyors are authorized to vary the regular method of survey as relates to the *contents of the tracts* and to the angles and boundary lines, and to lay out radiating lots or sections, fronting on the water courses, of certain specified dimensions and "of such shape and bounded by such lines as the nature of the country will render practicable and most convenient". Such sections, even though numbered 16, are not lands reserved for schools, the school reservations being limited to sections created by rectangular survey. *Board of Directors vs. New Orleans Land Company,* 138 La. 32, 70 So. 27; *Bres vs. Louviere,* 37 La. Ann. 736; *Lauve vs. Wilson,* 114 La. 699, 38 So. 522.

These provisions clearly show the Congressional intention to exclude navigable water bodies from the governmental surveys. If the intention had been otherwise, the provisions covering fractional townships and fractional and radiating sections would be entirely meaningless.

The same intention is expressed in the stated purposes of the Acts of 1806 and 1811. These acts relate entirely to the *public lands* of the Orleans Territory. They provide for the survey of the *"public lands"*, and authorize the President to direct the sale of the *"public lands"* so surveyed, except the 16th Section to be reserved for schools. Obviously, unless navigable water bodies are part of the "public land" they are entirely beyond the coverage of these statutes.

In *Mann vs. Tacoma Land Company*, 153 U.S. 273, 38 L. Ed. 714, the court denied the right of plaintiff to locate certain scrip issued under Act of Congress upon the tidelands of the State of Washington. The court there said:

> "It is settled that the general legislation of Congress in respect to public lands *does not extend to tide lands.* There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term 'public lands' *does not include tide lands.*
>
> * * * *
>
> "That there was no intent in the Valentine Scrip Act to make any exception to the general rule is evident not merely from the use of a term having such an accepted meaning, but from the further provision that the land 'if unsurveyed when taken, to conform, when surveyed, *to the general system of United States land surveys' for under that general system surveys are not extended to tide lands, nor those under navigable rivers above tide waters.*" (Italics ours.)

And for other cases so holding see: *Pollard vs. Hagan*, 3 How. 212, 11 L. Ed. 565; *Shively vs. Bowlby*, 152 U.S. 1, 38 L. Ed. 331; *Justheim vs. McKay*, 229 Fed. (2) 29 (cert. denied 351 U.S. 933).

It is also well settled that "public lands" include only such as are subject to sale or other disposition under *general laws. Newhall vs. Sanger*, 92 U.S. 761,

23 L. Ed. 769; *Union Pacific Railroad Company vs. Harris,* 215 U.S. 386, 54 L. Ed. 246; *Borax Consolidated vs. City of Los Angeles,* 296 U.S. 10, 56 S. Ct. 23; *Minnesota vs. Hitchcock,* 185 U.S. 373, 46 L. Ed. 954; *Justheim v. McKay,* 229 Fed. (2) 29 (cert. denied, 351 U.S. 933). This excludes Mud Hole Bay and Mud Hole Bayou from that classification. It has long been recognized by this Court that the United States has *never disposed* of the soil beneath navigable waters *by general laws.* During the territorial period, disposals even by *special laws* were not undertaken, except in limited cases where impelled by international duty or public exigency. *Shively vs. Bowlby,* 152 U.S. 1, 38 L. Ed. 331; *Mann vs. Tacoma Land Co.,* 153 U.S. 273, 38 L.Ed. 714; *McGilvra vs. Ross,* 215 U.S. 70, 54 L. Ed. 95; *United States vs. Holt State Bank,* 270 U.S. 49, 46 S. Ct. 197.

Specifically, this Court has held that 16th and 36th Sections reserved for schools can be created only out of the public land, *"for no other lands in our land system are subdivided into sections." Missouri K. & T. Railroad Company vs. Roberts,* 152 U.S. 114, 38 L. Ed. 377; *Minnesota vs. Hitchcock,* 185 U.S. 373, 46 L. Ed. 954. See also *Shively vs. Bowlby, supra.*

So elementary are these rules of survey that the Manual of Instructions for Survey of the Public Lands of the United States (1947) prepared by the Bureau of Land Management provides (Sec. 4) that "the beds of navigable bodies of water are not *public domain* and are not subject to *survey* and disposal by the United States."

If more should be needed, it can be found in the School Land Indemnity Acts. These acts provide for the selection of indemnity school lands when a school

section is fractional in quantity or where wanting by reason of the township being fractional *or from any natural cause' whatever.*[5] Obviously the typical natural cause of a fractional or wanting section is the intrusion of navigable water bodies into the land areas.

Specific application of the Indemnity Acts to sections lacking full acreage because of navigable water bodies is found in the decision of the Secretary of Interior in State of Idaho, 37 Interior Decisions, 430, 433:

> "Where a permanent body of water, such as a lake, etc., occurs, and the township in which it is embraced, or the several townships surrounding it, as the case may be, are thereby rendered fractional, it is evident that only those portions of such townships as are susceptible of being surveyed may properly be regarded as land, and if in such cases the school sections are not surveyed, under the rules of adjustment established by Congress, the area of such land as the township is found to contain will determine the quantity of school land to which the State is entitled."

The Indemnity Acts were passed long before the Protraction Act of 1912, and hence did not affect vested rights under the Acts of 1806 and 1811. Moreover, even if they had been enacted after that statute, they would still be a clear interpretation by Congress that it was never intended by the Acts of 1806 and

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[5] The Act of May 20, 1826 (4 Stat. 179) is the earliest of the indemnity acts. These acts are now codified under 43 U.S.C.A. 851 et seq.

1811 to extend the governmental surveys to navigable waters.

The extension of the outer lines of Section 16 by protraction to include portions of Mud Hole Bay and Mud Hole Bayou cannot make these water bodies part of the section.[6] The Protraction Act reserved for schools such 16th Sections as would have been created had the official governmental surveys been regularly extended over the public lands. If the section had been regularly surveyed, Mud Hole Bay and Mud Hole Bayou would have been excluded. Moreover, Congress could not in 1912 divest the State's title to navigable water bodies which, as later shown herein, had vested in the State a full century before.

II.

WITHOUT REGARD TO THE SURVEY PRINCIPLES DISCUSSED IN THE PRECEDING SECTION, THE STATE OF LOUISIANA ACQUIRED IN A PROPRIETARY CAPACITY BY VIRTUE OF ITS INHERENT SOVEREIGNTY THE BOTTOMS OF ALL NAVIGABLE INLAND WATERS WITHIN ITS BOUNDARIES UPON ADMISSION INTO THE UNION IN 1812 FREE OF ANY RESERVATION OF LANDS FOR PUBLIC SCHOOLS.

In the light of the numerous decisions of this Court extending over a period in excess of 100 years, it is

[6] It should be noted at this point that the outer lines of Section 16 were projected by the governmental surveyors at the time of the partial survey of the township, without knowledge of the existence or location of the water bodies here involved, and are not lines which were "protracted" after the Protraction Act of 1912 with the intent to include these water bodies in the section.

not open to dispute that each new State entering the Union became vested with title to the soil beneath inland navigable waters within its borders by virtue of its inherent sovereignty under the so-called "equal footing clause" of the Constitution. The 13 original States having reserved these water bodies as an attribute of their sovereignty, the new States were entitled to the same rights under the constitutional principle of equality among the states—the purpose of the Constitution being to create a union of "political equals". *Pollard vs. Hagan,* (1845), 3 How. 212, 11 L. Ed. 565; *Knight vs. United Land Association,* 142 U.S. 161, 35 L. Ed. 974; *Shively vs. Bowlby,* 152 U.S. 1, 38 L. Ed. 331; *Mann vs. Tacoma Land Co.,* 153 U.S. 273, 38 L. Ed. 714; *United States vs. Mission Rock Co.,* 189 U.S. 391, 47 L. Ed. 865; *Scott vs. Lattig,* 227 U.S. 229, 57 L. Ed. 490; *Oklahoma vs. Texas,* 258 U.S. 574, 42 S. Ct. 406; *United States vs. Holt State Bank,* 270 U.S. 49, 46 S. Ct. 197; *Mass. vs. New York,* 271 U.S. 65, 46 S. Ct. 357; *United States vs. Oregon,* 295 U.S. 1, 55 S. Ct. 610; *Borax Consolidated vs. City of Los Angeles,* 296 U.S. 10, 56 S. Ct. 23; *United States vs. California,* 332 U.S. 19, 67 S. Ct. 1658; *United States vs. Louisiana,* 339 U.S. 699, 70 S. Ct. 914; *United States vs. Texas,* 339 U.S. 707, 70 S. Ct. 918; *United States vs. Louisiana, et al.,* 363 U.S. 1, 80 S. Ct. 961.

Petitioners recognize the foregoing rule, but deny that it has application in this case. Simply stated, their contentions are that:

(1) Prior to Statehood title to the entire Territory of Orleans was vested in the United States, including soil beneath navigable inland waters, and under Article 4, Section 3, Cl 2 of the Constitution, the general government had the abso-

lute and unlimited power during the territorial period to dispose of said water bottoms to the prejudice of the future states;

(2) By the Acts of April 21, 1806 and March 3, 1811, reserving for schools the 16th section of each township to be thereafter created by survey of the public lands, Congress did so dispose of Mud Hole Bay and Mud Hole Bayou, such reservation "freezing" title in the United States until the school title could attach either by actual survey or under the Protraction Act of 1912.

Even if we eliminate the considerations set forth in Section I of this brief, which, we submit, are conclusive, these contentions are entirely without foundation.

Article IV, Sec. 3, Cl 2 of the Constitution gives Congress power to dispose of the "Territory and other property belonging to the United States", but this does not include the unqualified right to dispose of the bottoms of navigable inland waters of a territory to the prejudice of the sovereign rights of the future states as guaranteed by the "equal footing clause" of the Constitution. To so construe that power would completely nullify the equal footing clause. Obviously, the Constitution cannot guarantee the future states their navigable water bottoms and at the same time reserve to the general government the full and absolute right to dispose of them in the meantime.

Under numerous decisions of this Court the "power to dispose" is conditioned and limited with respect

to property affected by the "equal footing clause". In the present case these limits and conditions were clearly not met.

We concede that title to the bottoms of inland navigable waters in the Orleans Territory was actually vested in the United States during the territorial period. *Shively vs. Bowlby* (1893), 152 U.S. 1, 38 L. Ed. 331. However, this Court has always held that such title was held *in trust* for the ultimate benefit of the future states to be erected out of the territory. *Pollard vs. Hagan,* 3 How. 212, 11 L. Ed. 565; *San Francisco vs. LeRoy,* 138 U.S. 656, 34 L. Ed. 1096; *Knight vs. United Land Association,* 142 U.S. 161, 35 L. Ed. 974; *Shively vs. Bowlby,* 152 U.S. 1, 38 L. Ed. 331; *United States vs. Holt State Bank,* 270 U.S. 49, 46 S. Ct. 197; *United States vs. Mission Rock Company,* 189 U.S. 391, 47 L. Ed. 865; *Borax Consolidated vs. City of Los Angeles,* 296 U.S. 10, 56 S. Ct. 23.

In consequence of said trust, a strict construction has been adopted in considering whether a particular grant effected an alienation of navigable water bodies prior to Statehood, it being held that a "presumption against their separation must be indulged in construing these grants", and that "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was declared or otherwise made very plain". *Massachusetts vs. New York,* 271 U.S. 65, 46 S. Ct. 357; *United States vs. Holt State Bank,* 270 U.S. 49, 46 S. Ct. 197; *United States vs. Oregon,* 295 U.S. 1, 55 S. Ct. 610.

In keeping with that strict construction, it has been judicially recognized from the earliest times that *"Congress has never undertaken by general laws* to dispose of land below high water mark during the territorial period, and that in no event are such conveyances made, even by *special laws,* unless they become necessary in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory". *Shively vs. Bowlby,* 152 U.S. 1, 38 L. Ed. 331; *Mann vs. Tacoma Land Company,* 153 U.S. 273, 38 L. Ed. 714; *McGilvra vs. Ross,* 215 U.S. 70, 54 L. Ed. 95; *United States vs. Holt State Bank,* 270 U.S. 49, 46 S. Ct. 197.

The Acts of April 21, 1806 and March 3, 1811 do not meet the conditions and requirements for disposal of navigable water bottoms during the territorial period for obvious reasons: (1) they are not *special laws,* dealing with particular water bodies, but general laws relating to *public lands in the entire Orleans Territory;* and (2) not only do these acts fail to overcome the strong presumption against disposal, but they contain express provisions showing that navigable water bodies were to be excluded from the school sections to be thereafter created by the public surveys.

The cases of *State of Alabama vs. State of Texas,* 347 U.S. 272, 74 S. Ct. 481, and *United States vs. Holt State Bank,* 270 U.S. 49, 46 S. Ct. 197, cited by petitioners, do not support their case.

In the *Alabama* case, the court upheld the validity of the Submerged Land Act expressly granting coastal water bottoms to certain States. However, the case did not cover the sovereign right of a State to its navigable water bottoms upon entry into the Union, but only the right of the general government to convey property to a particular State *after its admission.* This in no way involves the "equal footing" principle. In *Justheim vs. McKay,* 229 Fed. (2) 29 (*Cert. denied,* 351 U.S. 933), the court commenting on this case pointed out that the Submerged Lands Act is a *special act,* and while the lands beneath navigable waters, may be disposed of by *special enactment,* this may not be done by *general* laws. The *Holt State Bank* case, recognized that the general government could dispose of the bottoms of navigable inland waters during the territorial period, but had never undertaken to do so by *general laws.* Even though the "grant" there involved was special, the Court, applying the presumption against disposal, ruled that none was intended, and that title to the water bottoms in dispute vested in the State when admitted into the Union.

III.

EVEN IF ASSUMED, ARGUENDO, THAT CONGRESS INTENDED BY THE ACTS OF APRIL 21, 1806 AND MARCH 3, 1811 TO INCLUDE THE BOTTOMS OF NAVIGABLE WATERS IN THE 16TH SECTIONS TO BE THEREAFTER CREATED BY SURVEY, SOVEREIGNTY OWNERSHIP OF THE WATER BODIES IN DISPUTE WOULD STILL PREVAIL.

Petitioners concede that title to the 16th Section here involved did not pass by survey under the Acts

of 1806 and 1811, but contend that such title was reserved for schools *and remained in the United States* until the School title could vest under the Protraction Act of 1912.[7]

This position completely ignores the many decisions of this Court relating to the status of school sections prior to the time school title vests.

By a long line of cases it has been firmly established that the school land grants are not grants *in praesenti* and until there has been a passage of title by survey,[8] the lands are under the absolute and unqualified control of the general government and are subject to withdrawal from the school grants, or to other disposition free of such grants. *Heydenfeldt vs. Daney Gold & Silver Mining Company,* 93 U.S. 634, 23 L. Ed. 995; *Minnesota vs. Hitchcock,* 185 U.S. 373, 46 L. Ed. 954; *United States vs. Morrison,* 240 U.S. 190, 60 L. Ed. 599; *United States vs. Sweet,* 245 U.S. 563, 38 S. Ct. 193; *Wisconsin vs. Lane,* 245 U.S. 427, 38 S. Ct. 135; *United States vs. Wyoming,* 331 U.S. 440, 67 S. Ct. 1319; *New Mexico vs. Ickes,* 72 Fed. (2) 72 (cert. denied 293 U.S. 596); *State of Utah vs. Bradley Estates, Inc.,* 223 Fed. (2) 129 (cert. denied 350 U.S. 841).

Illustrative of the foregoing principles are the following disposals which were held to supersede *prior* school grants where the school title has not yet vested:

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[7] Petition, pp. 19, 20: "Under the Acts of Congress enacted prior to 1812, which vested all sections numbered sixteen for school purposes the legal title to all such sixteenth sections *remained in the United States* until the sections were surveyed in place by the rectangular system of survey." Petition, p. 21: "If the Protraction Act had not been enacted, the legal title to school lands not protected by an official survey in place, *would still be in the United States.*"

[8] In this case the Protraction Act of 1912 is relied upon in place of survey.

United States vs. Wyoming, 331 U.S. 440, 67 S. Ct. 1319: The placing of a school section in a petroleum reserve by Presidential order under an Act of Congress *enacted after the school grant.*

Heydenfeldt vs. Daney Gold & Silver Mining Co., 93 U.S. 634, 23 L. Ed. 995: The passage of a law *authorizing* disposal of mineral lands to occupants and claimants. The school section in question was mineral land.

Wisconsin vs. Lane, 245 U.S. 427, 38 S. Ct. 135: The placing of a school section in a *Temporary Indian Reserve.*

United States vs. Morrison, 240 U.S. 190, 60 L. Ed. 599: The placing of a school section in a Forestry Reserve.

New Mexico vs. Ickes, 72 Fed. (2) 71 (cert. denied 293 U.S. 596): The placing of a school section in land designated for stock driveway purposes.

In several of the above cases the school sections had been previously identified by survey but the school grants were superseded because the survey had not been officially approved in the meantime.

The school land reservations in the Acts of April 21, 1806 and March 3, 1811 were superseded in 1812 as to Mud Hole Bay and Mud Hole Bayou (if we assume that these water bodies are school land) because the school title had not attached by survey, and Louisiana automatically acquired the bottoms of all inland navigable waters when it entered the Union. This title

was acquired by operation of law with the same effect as though Congress had passed a special act expressly conveying the property to Louisiana at the moment it became a State.

Petitioners' contention that the United States was required to hold land reserved for schools by the above acts in a "sort of trust" until the school title could attach is completely untenable, as it is in direct conflict with the above cases.

Moreover, this position ignores the fact that (1) by the Constitution of the United States adopted in 1789, (2) by the Treaty of Paris of April 30, 1803 (8 Stat. 202) whereby the United States acquired the Louisiana Territory, and (3) by the Enabling Act of February 20, 1811 (2 Stat. 641), providing for admission of Louisiana into the Union, the general government was required to hold all navigable inland water bodies in trust for the future State in satisfaction of its rights of sovereignty. The so-called implied "school trust" if one existed (which is denied) is inferior and must give way to the express trust previously established by the Constitution and by solemn treaty with a foreign nation.

Additionally, it would be entirely impractical and Congress could not have intended that title to unsurveyed 16th Sections be irrevocably held in trust until such title could vest by survey of the public land. Until survey no one would know what part of the public land would fall within a 16th Section, for the public surveys *create* and do not merely identify the governmental subdivisions. *State of Louisiana vs.*

Aucoin, 206 La. 786, 20 So. (2) 136; *Cox vs. Hart,* 260 U.S. 427, 43 S. Ct. 154. In *Heydenfeldt vs. Daney Gold and Silver Mining Company,* 93 U.S. 634, 23 L. Ed. 995 this Court held that a school grant "operating at once and attaching prior to the surveys of the United States, *would deprive Congress of disposing of any part of the public domain until there was a segregation by survey of the land granted.* Later, in *United States vs. Wyoming,* 331 U.S. 440, 67 S. Ct. 1319, the Court said that *"vesting in the State an immediate and irrevocable interest in the school sections before such sections had been identified by survey would be to complicate the performance of the government's obligation with respect to the public land."* Exactly the same complications would result if the United States were required to hold the title in suspense until the school title could attach.

Congress intended to place each School Land Grant State on an equal footing with the others with respect to the powers of the Federal Government in the unsurveyed school sections. *United States vs. Wyoming,* 331 U.S. 440, 67 S. Ct. 1319; *Heydenfeldt vs. Daney Gold & Silver Mining Co.,* 93 U.S. 634, 23 L. Ed. 995; *United States vs. Morrison,* 240 U.S. 190, 60 L. Ed. 599; *United States vs. Aikens,* 84 Fed. Supp. 260. The Protraction Act does not place Louisiana in a unique position in this respect as Petitioners contend. That act simply took the place of actual survey as the condition for passage of title to those unsurveyed public lands as are located within protracted 16th Sections.

IV.

THE SELECTION OF THE 16TH SECTION HERE INVOLVED AS SWAMP LAND, AND THE LAND DEPARTMENT'S REJECTION THEREOF BECAUSE PREVIOUSLY RESERVED FOR SCHOOLS, DO NOT PREVENT THE STATE FROM ASSERTING ITS SOVEREIGNTY OWNERSHIP OF MUD HOLE BAY AND MUD HOLE BAYOU.

The State selected all sections in T-21-S, R-14-E, including unsurveyed Section 16, under the Swamp Land Act of 1849 (Petitioners' Exhibit 38), and the Land Department rejected the selection of Section 16 because previously reserved for schools (Petitioners' Exhibits 39, 40). Unsurveyed Section 16 was carried on the selection list as containing 640 "estimated acres" because the actual acreage was not known.

This can in no way prejudice the rights of the State.

As a matter of law, swamp land is selected, and approved or rejected, according to the character of the land involved and without regard to the acreage or quantity thereof. As a consequence, the selection of an unsurveyed 16th Section, estimated to contain 640 acres, and the Land Department's rejection thereof, cover only lands of swamp character and do not include the sovereignty water bodies within the projected outlines of the section. Conclusive on this point are *State of Louisiana vs. Bayou Johnson Oyster Company*, 130 La. 604, 58 So. 405, and *McDade vs. Bossier Levee Board*, 109 La. 625, 33 So. 628.

Further, the 16th Section here involved did not exist until the same could be created by actual survey. Necessarily, the Department's rejection of such unsurveyed section could only be of the land which would ultimately comprise the section when finally so identified.[9] Since the public surveys do not extend to navigable water bodies, Mud Hole Bay and Mud Hole Bayou would be excluded.

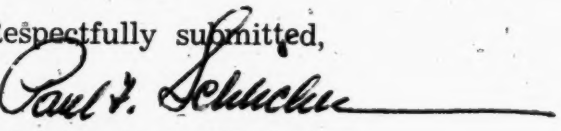
Finally, even if Louisiana's selection of unsurveyed Section 16, T-21-S, R-14-E and the rejection thereof by the Land Department embraced navigable water bodies (which is denied), the ruling would not bind the State nor affect its sovereign title to such water bodies because the jurisdiction of the Land Department does not extend thereto. The decisions of the Land Department are binding only with respect to matters within its jurisdiction. *Borax Consolidated vs. City of Los Angeles*, 296 U.S. 10, 56 S. Ct. 23; *Hardin vs. Jordan*, 140 U.S. 371, 35 L. Ed. 428; *Knight vs. United Land Association*, 142 U.S. 161, 35 L. Ed. 974; *Doolan vs. Carr*, 125 U.S. 618, 31 L. Ed. 844; *State of Louisiana vs. Bozeman*, 156 La. 635, 101 So. 4.

[9] Identification of the section by protracted lines under the Protraction Act of 1912 is not involved since the selection and rejection of Section 16 as swamp land was in the period 1850-1852.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari herein is entirely without merit and should be denied.

Respectfully submitted,



PAUL F. SCHLICHER,
135 East 42nd Street,
New York, New York,
Attorney for Respondent,
Texaco Inc.

WILEY G. LASTRAPES,
DANIEL P. HURLEY,
New Orleans, Louisiana,
JOHN M. DUHE, JR.,
New Iberia, Louisiana,
CHARLES F. BAILEY,
Lafayette, Louisiana,
Of Counsel.

CERTIFICATE OF SERVICE.

I, PAUL F. SCHLICHER, do hereby certify that copies of the foregoing brief in opposition to the Petition for Writ of Certiorari have been served upon Counsel of Record for Petitioners, by depositing the same on the 3. day of May., 1966 in the United States Post Office at New York, New York, with air mail postage prepaid, addressed to said Counsel of Record at their Post Office addresses as follows:

Mr. Lloyd J. Cobb,
Mr. Mettery I. Sherry, Jr.,
Messrs. Cobb & Wright,
902 Whitney Building,
New Orleans, Louisiana.

Mr. Wilmore J. Broussard, Jr.,
303 Ledet Building,
Houma, Louisiana.

Mr. Herbert W. Christenberry, Jr.,
1550 National Bank of Commerce Building,
New Orleans, Louisiana.

May 3., 1966.

Paul F. Schlicher

PAUL F. SCHLICHER,
Attorney for Respondent, Texaco Inc.